plaintiff had been guilty of inordinate and inexcusable delay in prosecuting the action."

Lord Diplock in his speech said (see p. 808): —

"For my part, for reasons that I have already stated, I am of opinion that the fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution where no question of contumelious default on the part of the plaintiff is involved; and in cases where it is likely that if the action were dismissed the plaintiff would avail himself of his legal right to issue a fresh writ, the non-expiry of the limitation period is generally a conclusive reason for not dismissing the action that is already pending."

Lord Salmon in his speech said (see p. 813): —

"Quite apart however from the matters to which I have just referred the fact that this action was dismissed for want of prosecution at a time when the limitation period had not yet expired is, in my opinion, by itself a sufficient reason for allowing this appeal. No doubt the limitation period was fast running out by the time the judge in chambers gave judgment dismissing the action on March 30, 1976, but the plaintiff's solicitors had taken the wise precaution of issuing a fresh writ on March 27, and it was quite plain that they were likely to serve the fresh writ should the action be dismissed for want of prosecution; and this writ was before the Court of Appeal when they dismissed the appeal on October 22, 1976.

To dismiss the action in such circumstances would only add to the cost and cause further delay. So that it follows that there was nothing to be gained by dismissing the action for want of prosecution. In such cases it can seldom be proper to do so: see *Instrumatic Ltd.* v. *Supabrase Ltd., per* Lord Denning MR. I am not saying that it is impossible for an action to be properly dismissed for want of prosecution before the expiration of the limitation period but this can happen only in the most rare and exceptional circumstances — none of which exist in the present case."

Lord Edmund-Davies in his speech said (see p. 817-818): —

"Putting aside cases where the plaintiff has so misled the defendant that it might be wrong to allow him to sue afresh, I hold that a plaintiff is free to issue within the limitation period a further writ claiming the same relief and based on the same grounds as an earlier writ for want of prosecution, and it is irrelevant to the competency of the second action that by the time it comes on the defendant may well be even more prejudiced than he would have been had the first action been permitted to proceed to trial.

Such being the law as I understand it, I respectfully concur with my noble and learned friend, Lord Diplock, that, where there appears any likelihood that a plaintiff will issue a second writ, the case must be quite exceptional (and difficult to imagine) where the court should within the limitation period dismiss an action simply for want of prosecution. If it be complained that this places the defendant at the mercy of a dilatory plaintiff, a partial answer is that in a flagrant case the defendant can always seek peremptory orders which, if disobeyed, render the plaintiff liable to have his action struck out on the ground of contumelious default; though there, too, a second writ can properly be issued within the limitation period, unless the circumstances are such that it could on other grounds be regarded as frivolous or vexatious."

The facts in *Birkett* v. *James* are set out in the speech of Lord Diplock (see p. 810) as follows: —

"*The facts of the instant appeal.*

The history of the proceedings that form the subject-matter of the instant appeal may be stated very shortly. In them the plaintiff sues the defendant for £1,000,000 alleged to have become due on April 1, 1970 under oral agreements made at latest by December 3, 1969, of which there is no written evidence. The writ was not issued until July 25, 1972. It was served on the following day and thereafter the action proceeded with reasonable dispatch until June 28, 1973. On that day an order was made by Chapman J. for the trial of preliminary issues of fact as to whether or not the alleged oral agreements had been made. It required the action to be set down for trial within 28 days, i.e. by July 26, 1973. The plaintiff did not set down the action by that date; and in circumstances into which it is not necessary to enter for the purposes of the instant appeal, no further steps were taken by the plaintiff in the action for two years, until on July 23, 1975 notice of intention to proceed was given on the plaintiff's behalf by solicitors who had replaced those who were acting for him at the time of Chapman J's order of June 28, 1973. The defendant riposted by a summons to dismiss the action for want of prosecution served on October 2, 1975. This was about six months before the limitation period for the plaintiff's cause of action would expire."

Birkett v. *James* is of the highest persuasive authority and, relying on that authority, we were of the opinion that in the present case no rare and exceptional circumstances exist for the action to be properly dismissed for want of prosecution. Accordingly, we allowed the appeal.

Appeal allowed.

Solicitors: *Rodyk & Davidson; Wu & Raja.*

JOHN B. SKILLING & ORS. v. CONSOLIDATED HOTELS LTD.

[C.A. (Chua, Kulasekaram and D'Cotta JJ.) March, 6, 1979]

[Singapore — Civil Appeal No. 77 of 1978]

Engineers — Consultant engineers — Non-registration of — Claim for professional services rendered — Reliance on agreement between parties — Non-compliance with provisions of statute requiring registration — Agreement illegal and unenforceable — Professional Engineers' Act (Cap. 225), ss. 18 & 19

Conflict of Laws — Proper law of contract — Agreement providing for law of State of Washington to govern — Non-registration of engineers — Non-compliance with lex fori — Agreement illegal and void — Professional Engineers' Act (Cap. 225), ss. 18 & 19.

Contract — Contract tainted with illegality — Consultant engineers — Non-registration.

The appellants in this case sought to claim a sum of $143,358.28 from the respondents for professional services rendered to the respondents pursuant to an agreement between the parties dated August 19, 1971. The parties had agreed that the proper law of the said agreement was the law of the State of Washington. The lower court dismissed the claim on the ground that the said agreement was void and unenforceable.

The appellants were partners in a firm of consultant engineers practising in the United States. They were, however, not registered as required under sections 18 and 19 of the Professional Engineers' Act (Cap. 225).

Held, dismissing the appeal: (1) the said agreement was illegal as it infringed the provisions of section 18 and 19 of the Professional Engineers Act;

(2) a court will not enforce a contract which by its own *lex fori* it would not enforce because it was tainted with illegality. In this connection the foreign law factor is irrelevant.

[Editorial Note: See also *Raymond Banham & Anor.* v. *Consolidated Hotels, Ltd.* [1976] 1 M.L.J. 5 in which Choor Singh J. disallowed the plaintiffs/engineers' claim for professional services rendered on the ground of non-registration which infringed the provisions of the Professional Engineers' Act (Cap. 225).

COURT OF APPEAL.

Mahmood bin Mohammed Fadjiar for the appellants.

Steven Chan Swee Teck for the respondents.

Chua J. (delivering the judgment of the Court): At the end of the hearing of the appeal we dismissed the appeal and said that we would give our reasons later. We do so now.

This appeal arises from a claim by the appellants to recover a sum of $143,358.28 (US$50,000) which they claimed was due to them for professional services rendered to the respondents under the provisions of an agreement dated August 19, 1971, entered into between the appellants and the respondents (the said Agreement). The appellants' claim was dismissed with costs on the grounds that the said Agreement was illegal and therefore unenforceable.

The appellants are partners in a firm of consultant engineers practising in Seattle in the United States of America. The respondent company, which is incorporated in Singapore and has its registered office also in Singapore, was at the material time engaged in the construction of a hotel complex project known as the Singapore Sheraton situated at the corner of North Bridge Road and Coleman Street in Singapore.

On August 19, 1971, the appellants and the respondents entered into the said Agreement on the basis of which the appellants were to render professional engineering services to the respondents in relation to the said project. The appellants performed their contractual obligations and duties arising under the said Agreement in relation to the said project. During the course of the appellants' work under the said Agreement the respondents issued a "stop-work" order to the appellants and terminated the said Agreement. At the time of the termination of the said Agreement no construction work had as yet commenced on the site of the said project and the site was still vacant land.

The appellants requested from the respondents payment of the professional fees due to them under the scale of payment set out in the said Agreement. Such fees claimed were in respect of design work services performed in pursuance of the said Agreement. Upon the respondents' refusal to pay, the appellants issued the writ in these proceedings.

The respondents in their defence maintained that the said Agreement was illegal, void and unenforceable. They relied on the provisions of sections 18 and 19 of the Professional Engineers' Act (Cap. 225) (the Act) which provide as follows: —

"18. Any person who not being registered as a professional engineer under this Act —

(a) uses verbally or otherwise the title of professional engineer, or makes use of any addition to or abbreviation of that title, or of any words, name or designation that will lead to the belief that he is a registered professional engineer, or is entitled to practise as such;

(b) advertises or holds himself out or conducts himself in any way or by any means as a registered professional engineer; or

(c) engages in professional engineering work except under the direction or supervision of a registered professional engineer,

shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding five thousand dollars and for a second or subsequent offence to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.

19. (1) No person shall employ as a professional engineer any person who had not been registered under this Act.

(2) Any person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding two thousand dollars and for a second or subsequent offence to a fine not exceeding five thousand dollars."

The appellants conceded that they were not registered under the Act.

The crucial question for determination in this case was whether or not the said Agreement was illegal in itself and accordingly unenforceable. The learned trial judge held that as the appellants were not registered under the Act the said Agreement was illegal and accordingly unenforceable. It is submitted by counsel for the appellants that this finding is wrong in law.

The argument of counsel for the appellants is this. The essential validity of a contract is governed by the proper law of the contract. This is the system of law by which the parties intended the contract to be governed.

It is submitted (1) that the proper law of the said Agreement is the law of the State of Washington, USA, since the parties under clause 14.1 of the said Agreement have expressly agreed that the said Agreement shall be governed by the laws of the State of Washington, USA; (2) that since there is an express clause in the said Agreement providing what the proper law is to be, that is conclusive in the absence of some public policy to the contrary; (3) that since there is no evidence that the said Agreement is illegal by its proper law, the said Agreement is a valid and binding agreement and can be enforced in Singapore.

It is clear that the said Agreement is illegal as it infringes the provisions of sections 18 and 19 of the Act. It is an elementary principle of law that a court will not enforce a contract which by its own *lex fori* it would not enforce because it is tainted with illegality. In this connection the foreign law factor is irrelevant. It follows that the said Agreement cannot be enforced here.

It is then submitted that it was not necessary for the appellants to register under the Act because they were engaged in professional engineering works under the "direction or supervision" of a registered professional engineer.

Counsel for the appellants submits that the respondents had appointed a local supervision engineer who was registered under the Act and as the appellants were "engaged in professional engineering work under the direction or supervision" of the said local engineer, it was not necessary for the appellants to register under the Act because of the provision of section 18(c) of the Act. There is no substance in this submission. The facts of the case are against the appellants. It is clear from the terms of the said Agreement that the appellants do not come under the control of anyone. The evidence of Mr. John Christiansen, a senior partner in the appellants' firm and the partner in charge of the appellants' Seattle office, left no doubt about this matter when he said: "We rely on the local

engineer for local information but we are the design engineers and although we discuss with him problems, the last word is with us. We make the final decision."

For these reasons we dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *Chor Pee & Co.; Boswell, Hsieh & Lim.*

WEI GIAP CONSTRUCTION CO. (PTE.) LTD. v. INTRACO LTD.

[A.C.J. (D'Cotta J.) June 22, 1978]

[Singapore — Companies Winding Up No. 86 of 1977]

Companies — Winding-up — Appeal against Winding-up Order — Company with $3 million liability to 150 creditors — Companies Act (Cap. 185), ss. 217(1)(b), 218(1)(c) & (e) and 218(2)(a).

The appellants in this case failed to settle the judgment debt of the sum of $71,570.13 due to the respondents as a result of which the latter obtained an Order for Winding-up against the appellants pursuant to section 217(1)(b) of the Companies Act. The appellants appealed.

It was not disputed that the appellants' total liabilities were about $3 million owing to 150 creditors. An amount of $1,881,601.13 was owed to the appellants by 9 debtors. Of these 9 debtors there were 3 whose total debts amounted to $1,300,000. Of these 3 debtors a Receiving Order had been made against the first debtor for the sum of $266,932 and a Winding-up order was made against the second firm which was alleged to owe the appellants the sum of $27,817. The third debtor claimed that only a sum of $28,000 was owing to the appellant and not $1,087,083 as alleged. The appellants' immovable properties were still mortgaged to the finance company.

Held, dismissing the appeal: (1) the mortgaged properties could not be regarded as assets of the company as the mortgagees were preferred creditors, the unsecured creditors being entitled only to the balance, if any, after payment of the mortgage debt and interest;

(2) in exercising its discretion, the court will have regard for the wishes of the majority of the creditors if they have good reason for opposing the petition;

(3) in the exercise of its discretion it is the duty of the court to weigh all the relevant matters and decide whether the *prima facie* right of the petitioning creditors to an order should give way to the wishes of some creditors who assign no reason for their opposition or who merely state that in their view the appellants might be in a position to pay their debts if allowed to continue to operate;

(4) in this case, there was abundant evidence that the company was insolvent and the opposing creditors had failed to show any good reason for their objection to the Winding-up order being made.

[Editorial Note: An appeal was lodged (Civil Appeal No. 35 of 1978) but was subsequently withdrawn].

Cases referred to:-

(1) *Re: Tweeds Garages Ltd.* [1962] 2 W.L.R. 40.

(2) *Bowes* v. *Hope Life Insurance & Guarantee Co.* (1865) 11 H.L.C. 388.

(3) *P & J Macrae Ltd.* [1961] 1 W.L.R. 229.

COMPANIES WINDING-UP.

Anthony C.S. Yap for the appellants.

Goh Aik-Chew for the respondents.

Cur. Adv. Vult.

D'Cotta J.: A winding up order was made against the appellants on the presentation of a petition pursuant to section 217(1)(b) of the Companies Act (Cap. 185) by the respondents. The ground on which the petitioning creditors is relying for the proceedings herein is found in section 218(1)(e) of the said Act which empowers the court to order the winding-up of a company if the company in question is unable to pay its debts. In sub-section (2)(a) of the same section, it is provided that the company is deemed to be unable to pay its debts if a creditor has served on the company by leaving at its registered office a demand for payment exceeding the sum of $500 and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the creditors' satisfaction.

It is not disputed that

(a) the petitioners obtained judgment against the appellants on the 20th day of April 1977 in Suit No. 933 of 1977 for the sum of $71,570.13 with interest thereon at the rate of 8% p.a. from the date of judgment until the date of payment;

(b) the petitioners by letter dated April 22, 1977 served the said judgment on the appellants together with a demand for payment of the judgment debt;

(c) the appellants have not to date paid the judgment debt or any part thereof;

(d) between April 29, 1977 and May 30, 1977, settlement of the judgment debt by instalments was negotiated and finalised but the appellants defaulted; consequently the petition herein was presented by the petitioners;

(e) the petitioners' papers are in order and were properly filed, advertised and served in compliance with the rules.

It is also not disputed that the appellants' total liabilities are in the region of about $3,000,000 owing to about 150 creditors. There is an amount of about $1,881,601.13 being owed to the company by about 9 debtors. Of these 9 debtors, there are 3 whose total debts amount to about $1,300,000 which call for some comment. The first of the three, Wei Leong Construction Co. are alleged to owe the appellants the sum of $266,932. A receiving order has been made against this firm on July 29, 1977 in Bankruptcy Nos. 869 and 882 of 1976. As regards the next debtor Teng Ta who is alleged to owe the sum of $27,817 a winding-up order was made against this firm in winding-up No. 49 of 1977 on May 27, 1977; such being the position the likelihood of recoverability from these two firms is almost nil except for some dividends which the Official Assignee or Official Receiver might declare in the event of there being any funds. The third debtor is alleged to be the D.B.S. Realty Pte. Ltd. whose indebtedness to the appellants is reputed to be in the region of $1,087,083. However, in a joint affidavit made on November 1, 1977 by Bay Kwee Chai and Loh Chai Chon, two directors and shareholders of the appellants, a sum of $28,000 only is certified as being due for payment by the D.B.S. Realty Pte. Ltd.

There is no evidence whether any payment has been received from the other debtors, or whether even